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17 UNITED STATES DISTRICT COURT
18 NORTHERN DISTRICT OF CALIFORNIA
19 SAN FRANCISCO DIVISION

20 CENTER FOR BIOLOGICAL DIVERSITY, et al.

21 Plaintiffs,

22 v.

23 BUREAU OF LAND MANAGEMENT,

24 Defendant,

25 and

26 HIGH DESERT MULTIPLE USE COALITION,
27 et al.

28 Defendant-Intervenors.

Case No. C-00-0927 WHA (JCS)

STIPULATION AND ORDER
CONCERNING LIVESTOCK
GRAZING IN DESERT TORTOISE
HABITAT

29 Ex Parte Motion for Continuance and Extension

Case No. C-00-0927 WHA (JCS)

1 WHEREAS, Plaintiffs, Center for Biological Diversity, et al. ("the Plaintiffs") filed this action on March
2 16, 2000, alleging that the federal defendant, Bureau of Land Management ("BLM") was in violation of Section 7 of
3 the Endangered Species Act ("ESA") by failing to enter into formal consultation with the U.S. Fish and Wildlife
4 Service ("FWS") on the effects of the adoption and implementation of the California Desert Conservation Area
5 Plan, as amended, ("CDCA Plan") on threatened and endangered species. 16 U.S.C. § 1536(a)(2);

6 WHEREAS, in a Stipulation approved by the Court on August 25, 2000, BLM acknowledged that because
7 activities authorized, permitted, or allowed under the CDCA Plan may adversely affect threatened and endangered
8 species, Section 7(a)(2) of the ESA, requires BLM to consult with FWS to insure that its adoption and
9 implementation of the CDCA Plan is not likely to jeopardize the continued existence of any threatened or
10 endangered species or to result in the destruction or adverse modification of the critical habitat of any such species.
11 16 U.S.C. § 1536(a)(2);

12 WHEREAS, the FWS has determined that the Mojave Population of an animal species, *Gopherus*
13 *agassizii*, commonly known as the desert tortoise (hereinafter "tortoise" or "desert tortoise"), is entitled to protection
14 as an threatened species under the ESA. 55 Fed. Reg. 12178 (April 2, 1990).

15 WHEREAS, pursuant to Section 7(a)(2) of the ESA, Each Federal agency shall, in consultation with and
16 with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency is not
17 likely to jeopardize the continued existence of any endangered species or threatened species or result in the
18 destruction or adverse modification of habitat of such species which is determined by the Secretary, after
19 consultation as appropriate with the affected states, to be critical, unless such agency has been granted an exemption
20 for such action by the Committee pursuant to section 7(h) of the ESA. 16 U.S.C. § 1536(a)(2);

21 WHEREAS, the Plaintiffs contend that livestock grazing in desert tortoise habitat (critical and non-critical)
22 is a threat to the continued existence of the Mojave population of the desert tortoise;

23 WHEREAS, the Plaintiffs filed a motion seeking to enjoin livestock grazing in desert tortoise habitat
24 pending BLM's completion of ESA § 7 consultation on the CDCA Plan;

25 WHEREAS, the parties would like to avoid unnecessary litigation over the need for an injunction pending
26 BLM's completion of ESA § 7 consultation on the CDCA Plan;

27
28 THEREFORE, the parties agree as follows:

1 A. Sheep Grazing

2 1. Until either –

3 (i) The receipt by BLM of the biological opinion on the effects of the CDCA Plan on the
4 Mojave population of the desert tortoise and (a) the implementation of any applicable terms and conditions,
5 reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation
6 and (b) the signing of the records of decision (RODs) for the NECO and NEMO bio-regional plan amendments, or

7 (ii) January 31, 2002,

8 whichever shall be later, BLM:

9 a. Shall implement the 13 terms and conditions in the current biological opinions for sheep
10 grazing.

11 b. Shall apply the National Fallback standards and guidelines for rangeland health. Based upon
12 rangeland health assessments, BLM will implement allotment-specific changes it deems necessary to meet these
13 standards and guidelines.

14 c. Except as indicated for Cantil Common and Shadow Mountain Allotments below, shall not
15 authorize sheep grazing in desert tortoise habitat. This includes 811,048 acres in the following nine allotments:

16	(1) Goldstone	11,056 acres
17	(2) Superior Valley	232,507 acres
18	(3) Gravel Hills	227,565 acres
19	(4) Monolith-Cantil	33,193 acres
20	(5) Shadow Mountain	69,395 acres
21	(6) Buckhorn Canyon	19,998 acres
22	(7) Cantil Common	102,397 acres
23	(8) Lava Mountain	2,165 acres
24	(9) Stoddard Mountain	112,772 acres

25 Not included in this total are 3,083 acres of critical habitat in Cantil Common and Shadow Mountain Allotments on
26 which sheep grazing will be allowed. In accordance with this same adjustment, BLM, shall not authorize sheep
27 grazing on 5,658 acres of non-critical habitat. The areas where grazing shall not be authorized will be depicted on
28 the maps referenced in Paragraph 4 of this Stipulation.

d. Shall not authorize sheep grazing in desert tortoise habitat (non-critical) in the following two allotments (totaling 135,247 acres):

(1) Rice Valley 85,565 acres

(2) Ford Dry Lake 49,682 acres

The areas where grazing shall not be authorized will be depicted on the maps referenced in Paragraph 4 of this Stipulation.

B. Cattle Grazing

2. Until either –

(i) The receipt by BLM of the biological opinion on the effects of the CDCA Plan on the Mojave population of the desert tortoise and (a) the implementation of any applicable terms and conditions, reasonable and prudent alternatives, and/or reasonable and prudent measures requiring immediate implementation and (b) the signing of the records of decision (RODs) for the NECO and NEMO bio-regional plan amendments, or

(ii) January 31, 2002,

whichever shall be later, BLM:

a. Shall implement the 41 terms and conditions in the current biological opinions for cattle grazing.

b. Shall apply the National Fallback standards and guidelines for rangeland health. Based upon rangeland health assessments, BLM will implement allotment-specific changes it deems necessary to meet these standards and guidelines.

c. Shall not issue permits for temporary non-renewable perennial forage use in desert tortoise habitat.

d. Shall not authorize grazing on 206,509 acres of desert tortoise critical habitat in Pilot Knob, Piute Valley, Chemehuevi, which are ephemeral-only grazing allotments. The areas where grazing shall not be authorized will be depicted on the maps referenced in Paragraph 4 of this Stipulation.

e. Shall not authorize grazing on 47,107 acres of desert tortoise habitat (non-critical) in Pilot Knob, Piute Valley, Chemehuevi, which are ephemeral-only grazing allotments. The areas where grazing shall not be authorized will be depicted on the maps referenced in Paragraph 4 of this Stipulation.

f. Shall not authorize grazing in Jean Lake, Crescent Peak, Lanfair Valley Allotment (101,912 total acres of desert tortoise critical habitat), three allotments that are not currently being grazed.

g. Shall not authorize grazing in Whitewater Allotment, which includes 39,307 acres of non-critical tortoise habitat.

h. Shall not authorize grazing in 17,680 acres of desert tortoise critical habitat in the following two allotments:

(1) Valley View 5,779 acres

(2) Kessler Springs 11,901 acres

The areas where grazing shall not be authorized will be depicted on the maps referenced in Paragraph 4 of this Stipulation.

i. Shall not authorizing grazing in 2,616 acres of desert tortoise habitat (non-critical) on the Kessler Springs Allotment. The areas where grazing shall not be authorized will be depicted on the maps referenced in Paragraph 4 of this Stipulation.

j. Shall not authorize grazing in 285,381 acres of tortoise critical habitat from March 1 through June 15 and from September 7 through November 7 in the following five allotments:

(1) Cronese Lake 18,000 acres

(2) Harper Dry Lake 16,482 acres

(3) Ord Mountain 54,000 acres

(4) Valley Wells 88,879 acres

(5) Lazy Daisy 108,020 acres

The areas where grazing shall not be authorized will be depicted on the maps referenced in Paragraph 4 of this Stipulation. For each allotment referred to in this subparagraph, BLM shall not authorize grazing that exceeds the number of animal days per year per allotment that is equal to the average of the number of animal days per year per allotment that was reported by each permittee for the 1997, 1998, and 1999 billing years. These numbers are:

(1) Cronese Lake 13,383 animal days per year

(2) Harper Dry Lake 17,033 animal days per year

(3) Ord Mountain 62,842 animal days per year

(4) Valley Wells 51,433 animal days per year

(5) Lazy Daisy 39,541 animal days per year

k. Shall not authorize grazing in 23,300 acres of tortoise habitat (non-critical) in the following three allotments:

- (1) Lacy-Cactus-McCloud 18,000 acres
- (2) Tunawee Common 1,800 acres
- (3) Hansen Common 3,500 acres

The areas where grazing shall not be authorized will be depicted on the maps referenced in Paragraph 4 of this Stipulation.

l. Shall not authorize grazing in 213,281 acres of non-critical tortoise habitat from March 1 through June 15 and from September 7 through November 7 in the following six allotments:

- (1) Cady Mountains 88,320 acres
- (2) Rattlesnake Canyon 6,600 acres
- (3) Rudnick Common 31,000 acres
- (4) Horsethief Springs 47,581 acres
- (5) Walker Pass 32,100 acres
- (6) Pahrump Valley 7,680 acres

The areas where grazing shall not be authorized will be depicted on the maps referenced in Paragraph 4 of this Stipulation.

3. Until the signing of the record of decision (ROD) for the West Mojave bio-regional plan amendment, BLM shall exclude cattle from the canyon area of the Rattlesnake Canyon Allotment. This exclusion applies to trailing of cattle through the canyon, which shall not be permitted. Fences or other barriers necessary to effectuate this exclusion shall be erected by June 1, 2001. This fencing effort will not affect the schedule for completion of the ongoing boundary fencing project on the Rattlesnake Allotment. In addition, the number of livestock that shall be authorized for the Rattlesnake Canyon Allotment shall be decreased by a percentage equal to the percentage of land that is excluded from the allotment by this provision. At the time that this Stipulation is being approved by the parties, it is generally believed that the canyon area referred to in this paragraph is bounded by Rattlesnake Spring and the Section 10 (T.2N, R.3E) boundary line. The parties agree that the final location of the fencing to be placed in this area will be determined by BLM, in consultation with the Plaintiffs, after appropriate visits to the site.

1 4. By February 15, 2001, BLM will provide to Plaintiffs a map or maps indicating the location of the
2 portion or portions of the allotments referenced in Paragraphs 1 and 2 where grazing shall not be authorized while
3 this Stipulation remains in effect.

4 5. To the extent this Stipulation requires new fencing to exclude livestock from any area, "wildlife safe
5 fencing" shall be used. This fencing shall be selected in accordance with the specifications outlined in BLM's
6 Fencing Manual and Handbook.

7 **C. Enforcement and Compliance Review**

8 6. While this Stipulation remains in effect, BLM agrees to review compliance with the restrictions
9 resulting from this Stipulation on the allotments referenced in Paragraphs 1 and 2 of this Stipulation at least once
10 every two weeks for those allotments in which cattle are to be excluded from tortoise habitat year-round and at least
11 once every week for those allotments in which cattle are to be excluded from tortoise habitat on a seasonal basis, to
12 determine whether livestock are present in excluded areas. These compliance reviews shall be conducted in a
13 manner designed to detect noncompliance. If livestock are present in excluded areas, BLM will make every
14 reasonable effort to remedy situations of livestock encroachment into excluded areas at the time of discovery. In the
15 event the situation cannot be remedied at the time of discovery, BLM will make every effort to verbally notify
16 owners (within 24 hours) to remove livestock. In the event livestock are not removed as requested within 48 hours
17 after notification, BLM shall initiate the procedures outlined in 43 C.F.R. § 4150.2 and/or 43 C.F.R. § 4170.1-1, if
18 the owner of the livestock is known, or 43 C.F.R. § 4150.4, if the owner of the livestock is not known. For those
19 allotments for which cattle are to be removed seasonally from desert tortoise habitat (Paragraphs 2(i) and 2(k)), for
20 every day on which cattle are documented to be present in excluded areas during the time of exclusion, the ending
21 date of the seasonal closure (June 15 or November 7) will be extended by an additional day. For those allotments
22 for which cattle are to be removed year-round from desert tortoise habitat (Paragraphs 2(d), 2(e), 2(f), 2(g), 2(h),
23 and 2(j)), if cattle are documented to be present in excluded areas, if the removal procedures outlined in this
24 paragraph have been invoked, and cattle are subsequently documented to be in the excluded areas (second offense),
25 BLM shall reduce the number of animal days per year authorized for that allotment by the number of animal days of
26 cattle documented to be in the excluded areas on the occasion of the violation.

27 7. While this Stipulation remains in effect, whenever BLM receives a report of the presence of livestock
28 in excluded areas, BLM agrees to verify the presence of livestock within 48 hours, and if livestock are present, to

1 initiate the procedures outlined in the previous paragraph of this Stipulation. To the extent practicable, any report of
2 livestock in excluded habitat should provide the name of the reporter, the date and time of the discovery, the
3 location of the livestock, and the number of livestock present in the excluded habitat.

4 8. While this Stipulation remains in effect, BLM will provide to the Plaintiffs all data or other
5 documents in its possession generated as a result of its regular inspections of excluded habitat (referenced above).

6 9. Plaintiffs and BLM agree that the terms of this Stipulation are enforceable. BLM represents that it
7 intends to make every effort to comply with its terms in good faith. If, however, through unforeseen circumstances,
8 events should change after the agreement is executed, BLM will notify the Plaintiffs as soon as reasonably possible
9 of the change and the reason therefore. The parties agree to attempt to work reasonably toward a mutually
10 acceptable solution. If the parties are unable to agree, Plaintiffs reserves the right to renew its motion for injunctive
11 relief with regard to the allotment(s) in question.

12 D. Conservation

13 10. For allotments affected by this agreement for which resource conservation would be advanced
14 significantly from the elimination of grazing, BLM agrees that if the lessee of record/permittee requests non-use
15 during the period of time in which this agreement remains in effect or during the period of time until the land use
16 plan governing that allotment is revised (whichever shall be longer), BLM agrees that it will not consider outside
17 (third-party) applications for grazing in that allotment during the requested period of non-use.

18 11. For the NEMO and NECO coordinated bio-regional plan amendments, BLM agrees to include in an
19 alternative, a proposal to cancel grazing allotments in desert tortoise critical habitat at the request of the permittee.
20 For subsequent plan amendments, BLM further agrees to include in an alternative a proposal to cancel grazing
21 allotments upon the request of the lessee of record/permittee where resource conservation would be advanced
22 significantly by the elimination of grazing.

23 E. Actions by Plaintiffs

24 12. In consideration for the actions to be taken by BLM, Plaintiffs shall withdraw their Motion for
25 Permanent Injunction with respect to grazing in desert tortoise habitat currently noticed for December 21, 2000.
26 Plaintiffs further agree that they will not seek injunctive relief through this litigation with respect to livestock
27 grazing in desert tortoise habitat so long as BLM complies with the terms of this Stipulation. Nothing in this
28


1 Stipulation shall be construed so as to prevent the Plaintiffs from challenging livestock grazing in the CDCA for
2 reasons other than for BLM's failure to consult on the CDCA Plan.

3 **F. Effect of this Stipulation**

4 13. This Stipulation shall not be interpreted or construed as an admission by any of the parties of any
5 claim or defense in this litigation.

6 14. Nothing in this Stipulation shall be interpreted or construed as a commitment or requirement that
7 BLM or any other federal agency obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. §
8 1341, or any other applicable provision of law.

For Plaintiffs:

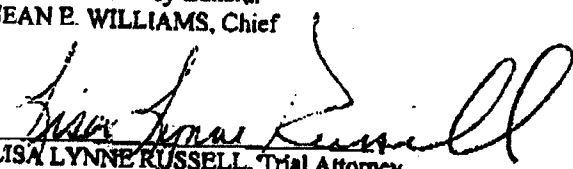

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Stipulation and Order

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RICHARD W. WIEKING
CLERK
U.S. DISTRICT COURT
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR BIOLOGICAL DIVERSITY,
a non-profit corporation; SIERRA CLUB, a
non-profit corporation; and PUBLIC
EMPLOYEES FOR ENVIRONMENTAL
RESPONSIBILITY, a non-profit
corporation,

Plaintiffs,

v.

BUREAU OF LAND MANAGEMENT,

Defendant.

No. C 00-00927 WHA

ORDER APPROVING PARTIAL
SETTLEMENT AND CONSENT DECREE
RE LIVESTOCK GRAZING

In this action to enforce the Endangered Species Act, 16 U.S.C. 1531 et. seq., in the California desert area, the Bureau of Land Management and plaintiffs have reached a partial settlement and proposed consent decree relating to livestock grazing in the habitat of the desert tortoise, an endangered species. All parties who timely and properly intervened have filed a statement of non-opposition.

Other members of the public opposed the settlement and were invited and allowed to appear as amici at the court hearing on January 26 concerning whether the settlement should be approved. Several did. All objections have been considered. Their objections are not sufficient to defeat settlement. Aside from what was stated on the record by the Court, this summary order notes the following.

1 1. The settlement and consent decree contemplate the BLM taking steps to modify
2 the terms and conditions of existing cattle-grazing permits under the Taylor Act, 43 U.S.C. 315
3 et. seq. Amicus Dave Fisher holds one or more such permits. Contrary to his fears expressed at
4 the hearing, the settlement and consent will not reduce any rights to administrative notice and/or
5 hearings prior to making such modifications. The settlement and consent order only require the
6 agency to take otherwise lawful action that it is already authorized to do. Mr. Fisher and any
7 other rancher with permits are free to try to prove at administrative hearings (or in court on
8 judicial review) that any modification will be unlawful. The settlement and consent order will
9 not and may not be asserted as a legal authority for any agency action over and above the BLM's
10 existing statutory authority.

11 2. Similarly, this settlement and consent order in no way suspends or supercedes any
12 requirement for public notice or opportunity for public comment to which the BLM is subject.
13 The Court makes no finding that any "emergency" does (or does not) exist.

14 3. The objection as to lack of subject-matter jurisdiction is overruled. The argument
15 goes as follows. The most recent agency action concerning the desert tortoise occurred more
16 than six years ago before suit and therefore the statute of limitations ran. Sovereign immunity
17 bars any untimely lawsuit. The main problem with this argument is that the suit also involves
18 other species from the same desert area that are clearly within the statute of limitation. The
19 Court has subject-matter jurisdiction over the suit. If the parties wish to add collateral matters
20 into the overall disposition of the suit, then the Court sees no bar on jurisdictional grounds.
21 Moreover, the Court disagrees that the statute had run even as to the desert tortoise. A long-term
22 resource management plan that has an ongoing and long-lasting effect even after its adoption,
23 such as the CDCA, is "continuing agency action" under the Endangered Species Act, at least as
24 to the duty to consult. Cf. *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1056 (9th Cir. 1994).
25 Implementation of the plan without consultation is, to this date, a continuing violation.

26 * * *

27 Finally, the Court must observe that its scope of review over such settlements is limited.
28 The BLM has been charged with a public trust over the lands in question. It has decided that the

1 settlement carries out its statutory mission. The agency could embark upon every action
2 contemplated by the agreement, with or without litigation, simply under its statutory mandate
3 (subject to administrative rights and review in individual implementations such as Mr. Fisher has
4 done). The broad course of action contemplated, involving closures and restrictions on public
5 land, is within the authority of the agency (subject again to administrative rights and review in
6 individual implementations). Deference to the agency charged with administration of the lands
7 in question is warranted. *See United States v. Oregon*, 913 F.2d 576, 580 (9th Cir. 1990);
8 *Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615, 624 (9th Cir. 1982). Accordingly,
9 the Court approves the stipulation and order concerning livestock grazing and the desert tortoise
10 filed August 25, 2000.

11
12 **IT IS SO ORDERED.**

13
14 Dated: January 29, 2001.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE